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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1262

STATE OF ARKANSAS, *et al.*,
v. *Petitioners*
STATE OF OKLAHOMA, *et al.*,
Respondents

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
v. *Petitioner*
STATE OF OKLAHOMA, *et al.*,
Respondents

**On Writs of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

**BRIEF OF MIKE SYNAR, MEMBER OF CONGRESS,
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

Representative Mike Synar submits this brief in support of respondents and urges this Court to uphold the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).¹

¹ The petitioners and respondents have consented to the filing of this brief. The letters granting consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The *amicus* Member of Congress, Mike Synar, has a substantial interest in the outcome of this case before the Supreme Court. The interest is as an individual member of Congress since 1979; as the Chairman of the Government Operations Subcommittee on Environment, Energy and Natural Resources (Subcommittee); and, as a member of the Energy and Commerce Committee. While Chairman of the Subcommittee for over eight years, the Subcommittee has conducted oversight hearings on the Environmental Protection Agency (EPA), an agency within the jurisdictional responsibilities of the Subcommittee. The Subcommittee also has held hearings related to the implementation and enforcement of the Clean Water Act. A reversal of the Court of Appeals decision would frustrate the intent of Congress in adopting the Clean Water Act and impact the ability of the oversight committees to evaluate the actions of the appropriate agency.

The arguments put forth in this amicus brief reflect the legal analyses and opinion of the individual Member of Congress and are not intended to represent a statement of position on behalf of the institution of the House of Representatives, the Government Operations Committee, the Subcommittee, or, the Energy and Commerce Committee.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Tenth Circuit is not inconsistent with the intent and purposes of the Clean Water Act. 33 U.S.C. 1251 *et seq.* In fact, the decision embraces the intent of Congress in adopting the Clean Water Act. The EPA must enforce and implement the Clean Water Act in such a manner to ensure that downstream standards are met. If this portion of the decision is not upheld, the intent of the Clean Water Act will be subverted and the goal of achieving clean

water in all communities will be more difficult, if not impossible, to accomplish. Reversal of the decision would allow upstream States to implement weaker standards of water quality, particularly if the discharge or pollution primarily will affect the waters of a downstream State thus preventing downstream States from ever achieving their own water quality standards.

The ability of Congress to provide oversight in these matters depends on the EPA's adherence to the legislative language of the implementing legislation, the adopted regulations pursuant to the legislation, and its performance of its responsibilities according to standards known to the persons affected by its actions. The decision of the EPA to modify the approved water quality standards adopted by the State of Oklahoma in order to approve the discharge permit for the Fayetteville sewage treatment plant contradicts the intent of the Clean Water Act and the objective standards by which the EPA must be evaluated.

ARGUMENT

I. ACCOMPLISHING THE GOALS OF THE CLEAN WATER ACT REQUIRES ADHERENCE TO FEDERALLY APPROVED DOWNSTREAM WATER QUALITY STANDARDS.

In adopting the Clean Water Act, Congress provided a clear declaration of goals and policy. As an element of those goals Congress expressed a desire to encourage a State-Federal partnership in order to restore the quality of the nation's waters.² The balancing of interests between States in order to accomplish a national goal in-

² Section 101(b), 33 U.S.C. sec. 1251(b) states in part that: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

evitably creates a conflict. Resolution of the conflict between States must be in accordance with the expressed legislative intent to reduce and eliminate water pollution.

The statutory scheme devised to accomplish this goal is one that recognizes that the EPA must approve water quality standards of individual States and must determine if particular permits violate those standards. Section 401, 402, 33 U.S.C. secs. 1341, 1342. All States are on notice of approved water quality standards for other States. Pursuant to 40 C.F.R. sec. 131.21(d), the EPA is required to publish, at least annually, a notice of approvals of State water quality standards.

This Court has held that an individual State can not impose its standards on another State through the operation of either State or Federal common law. *International Paper Co. v. Ouellette*, 479 U.S. 481, 490-491 (1987). This holding in *International Paper*, however, does not preclude the decision by the Court of Appeals below that the EPA apply downstream State water quality standards once these are reviewed and approved by the EPA.

Congress did not intend that States affected by effluent discharges permitted by a neighboring State were to be denied influence in the regulation of standards. The Clean Water Act clearly permits the objection of a State to the approval of a permit. Section 401(a)(2), 33 U.S.C. sec. 1341(a)(2). If Congress had intended to exclude consideration of downstream water quality standards, no such procedure for permitting the affected State to raise an objection to a permit, as violating its water quality standards, would have been included in the provisions of the Clean Water Act.

II. THE ACTIONS OF THE EPA MUST BE PREMISED ON OBJECTIVE STANDARDS TO PROVIDE A FRAMEWORK FOR EVALUATION AND ACCOUNTABILITY.

Pursuant to Rule X, clause 1(j) and clause 2(b)(1) and (2) of the Rules of the House of Representatives, the Government Operations Committee has the authority to review all government functions and to evaluate the "application, administration, execution, and effectiveness" of all laws within its jurisdiction.³ Pursuant to these rules and the Rules of the Committee on Government Operations, the Subcommittee has reviewed and continues to review the operations and actions of the EPA and the implementation and effectiveness of the Clean Water Act. As part of that review, the General Accounting Office (GAO) has submitted reports evaluating the EPA's administration of the Clean Water Act and other environmental statutes.

Standards and specific goals are set by the Clean Water Act in order to have a measurement of performance. The measure of effectiveness depends not only on evaluating EPA's enforcement but also the ability of the entities to meet the standards set by the statute. Once the "rules" are determined, affected parties are on notice and thus

³ Rule X, clause 1(j) states in part: "In addition to its legislative jurisdiction under the preceding provisions of this paragraph (and its oversight functions under clause 2(b)(1) and (2)), the committee shall have the function of performing the activities and conducting the studies which are provided for in clause 4(c)." Rule X, clause 2(b)(1) states in part: "Each standing committee . . . shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws or parts of laws . . . in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated." Rule X, clause 2(b)(2) states: "The Committee on Government Operations shall review and study, on a continuing basis, the operation of government activities at all levels with a view to determining their economy and efficiency."

protection is provided to all parties. The appropriate Committee and subcommittee can then exercise its responsibility to conduct oversight in an appropriate and objective manner.

The Clean Water Act requires that States adopt water quality standards to accomplish the goals of the Act. Section 303, 33 U.S.C. sec. 1313. The State of Oklahoma adopted such water quality standards which were initially approved by the EPA in 1982. The statute requires a three year review, at which time in 1985 the standards were again approved by the EPA. In this matter, the "rules" were established upon the approval of the State of Oklahoma's water quality standards.

The discretionary authority of the EPA to modify the water quality standards of a State exists at the time it is reviewing the standards for initial or subsequent approval. At that time, the EPA must review the standards and determine if all the requirements of the Clean Water Act are met. This review should consider the interests of the State, other potentially affected States and federal environmental goals. The EPA could have anticipated potential conflicts with other States arising from the State of Oklahoma's adopted water quality standards prior to approval of the standards and required changes. There is no question that the Administrator of EPA under section 303(c)(3), 33 U.S.C. sec. 1313(c)(3) can reject the standards if "not consistent with the applicable requirements" of the chapter. There is a process for notification; for requiring changes; and, a process for the Administrator to adopt a new or revised water quality standard under section 303(c)(4), 33 U.S.C. sec. 1313(c)(4) if the State does not make such required changes.

The EPA could have required pre-approval modifications to the State of Oklahoma's water quality standards to accommodate the change it now wishes to make in order to uphold its approval of a permit allowing discharge. The change contradicts the approved Oklahoma

standard for the upper Illinois River which states that: "No degradation shall be allowed . . ." in high quality waters.⁴

Section 303(c)(3) of the Clean Water Act, 33 U.S.C. sec. 1313(c)(3) states that if the submission of a State meets applicable standards of the Act, "... such standard shall thereafter be the water quality standard for the applicable waters of that State." The section does not declare that the standards apply only to the State submitting the standards, but to the "*applicable waters*" of that State.

The EPA has the authority to consider whether the issuance of a permit is in compliance with applicable water quality standards. Section 401(a)(2), 33 U.S.C. sec. 1341(a)(2). When the EPA issues the permit, it is responsible for evaluating the permit in the same manner. Section 402(a), 33 U.S.C. sec. 1342(a). Thus, subsequent applications for permits which involved actions that affected the State of Oklahoma waters should have been reviewed in light of the previously approved water quality standards. The decision did not warrant the use of discretionary authority by the EPA since it had already accepted and approved a standard that did not leave room for discretion.

The conclusion of the EPA, that its discretionary authority permits it to reevaluate approved water quality standards in issuing a permit, goes beyond the statutory grant of discretionary authority. The principle of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) is that Congressional intent had to be ambiguous before the courts would defer to the discretionary policymaking of the implementing agency. In this matter the statute is clear as to when and how state standards are approved

⁴ 1982 Oklahoma Water Quality Standards and 1985 Oklahoma Water Quality Standards can be found in the Joint Appendix at pages 22 and 64 respectively. The cited section is at pages 28 and 64.

and how and when the EPA has the authority to revise or modify the standards.

Changing the rules by modifying standards after approval defeats the purpose of maintaining consistency in the application of approved standards and in the goal of providing notice to all affected parties. Congress has had concerns with the manner in which the EPA administers these programs. In evaluating the EPA's role in achieving national environmental goals, the GAO issued one report which alerted Congress to the potential for inconsistencies in enforcing environmental statutes. The GAO noted in a general management review evaluating the EPA that:

Achieving the EPA's goal of managing for measurable environmental results is dependent on identifying and developing measures of environmental quality. A well chosen set of measures would allow policymakers and the public to assess the general health of the environment and changes in its conditions . . . Without measures to serve as a decisional basis, EPA and Congress are faced with subjective reasoning as their sole method of assessing the effectiveness of environmental programs.⁵

The report explored in detail the problems existing between the EPA and States in the delegation of authority, monitoring and lack of defined roles and expectations on the part of the EPA. These concerns have not abated and are presently the subject of an ongoing review.

The EPA should be required to operate within the dictates of the Clean Water Act. Unless the EPA is held to the standards it has approved, oversight of the EPA policies, standards and effectiveness of national environmental goals will be even more difficult for Congress.

⁵ ENVIRONMENTAL PROTECTION AGENCY, *Protecting Human Health and the Environment Through Improved Management*, GAO/RCED-88-101, at 82 (August 1988).

CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be upheld in all respects.

Respectfully submitted,

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